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No. 80-5950

In the
Supreme Court of the United States
October Term, 1980

LAVERNE L. LOGAN,
Appellant,
vs.
ZIMMERMAN BRUSH COMPANY,
Appellee.

On Appeal From The Supreme Court Of Illinois

SUPPLEMENTAL BRIEF FOR APPELLEE ZIMMERMAN BRUSH COMPANY

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This Supplemental Brief is filed by Rudnick & Wolfe pursuant to the request of this Court.

QUESTIONS PRESENTED

The Supreme Court of Illinois construed Section 8(b) of the Illinois Fair Employment Practices Act as requiring that a discrimination charge be automatically dismissed unless the state agency administering the Act held a hearing on the charge within 120 days of its filing. The questions presented are:

1. Whether Section 8(b), as construed, violated the federal due process and equal protection rights of a complainant whose charge was not heard within 120 days of filing because of the negligence of the state agency.

2. Whether reinstating the complainant's discrimination charge against his employer, as a means of remedying the state agency's negligence, is an appropriate exercise of the appellate jurisdiction of this Court.

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> "The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatory employment practices. The legislature could establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate [Logan's] constitutional rights."

82 Ill.2d at 108; 411 N.E.2d at 282 (1980).

SUMMARY OF ARGUMENT

The State of Illinois can place reasonable limitations on a state-created cause of action for employment discrimination based on physical handicap. Since whatever property and liberty interests Logan claims to have were created by state law, not federal law, this Court must look to the Illinois Supreme Court's decision to determine whether Logan's right to a cause of action against the Company came within the definition of "property" or "liberty." The Illinois Supreme Court held that the Commission's failure to convene a timely fact-finding conference on Logan's charge required the automatic dismissal of that charge in view of the underlying policies, stated goals and mandatory language of the FEPA. This construction of Section 8(b), binding on this Court, means that under Illinois law, Logan was not guaranteed a right to prosecute his FEPC charge unless the Commission performed its statutory duty, which it failed to do. Even if some causes of action can be considered "property" under this Court's decision in *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553 (1980), Logan's interest in his Illinois FEPA charge cannot, because the 120-day conference requirement of Section 8(b), and the automatic dismissal which results when that requirement is not met, are important aspects of the State's

definition of the interest created under the FEPA. The requirements of Section 8(b) applied with equal force to each and every complainant who filed an FEPA charge while that statute was in effect. Logan has therefore failed to state a violation of his federal due process and equal protection rights.

Even if a property interest is assumed to exist, Logan is not entitled to have his cause of action against the Company reinstated before the Commission. The Illinois Supreme Court has recognized that under Illinois law, employers charged with employment discrimination have certain rights, including the right to expect the Commission to follow statutory procedures on a charge. Reinstating Logan's charge would impermissably shift the burden for the Commission's negligence to the Company, in contravention of express policies embodied in the FEPA and with no apparent justification under the Fourteenth Amendment. Reinstatement can only be accomplished by invalidating Section 8(b), a statute since repealed, amended and reenacted as part of a comprehensive Human Rights Act, as repugnant to the United States Constitution, a drastic and unnecessary result. Under this Court's recent decision in *Parratt v. Taylor,* ..... U.S. ....., 101 S.Ct. 1908 (1981), a postdeprivation remedy can satisfy due process requirements when a deprivation occurs as the result of a state employee's random and unauthorized negligence. Several different remedies against the Commission may be available to Logan under Illinois law, but Logan has not chosen to pursue any of them. Logan has therefore not been deprived of property "without due process of law."

ARGUMENT

I. Logan Was Not Deprived of Property or Liberty Within the Meaning of the Fourteenth Amendment, Because Logan's Rights Under the Illinois Fair Employment Practices Act Were Conditioned on a Timely Conference, and No Such Conference Was Held.

This Court has recently reaffirmed that it has no supervisory jurisdiction over state courts, and that its role in reviewing state court judgments is confined to evaluating those judgments "in relation to the Federal Constitution." *Chandler v. Florida,* ..... U.S. ....., ..., 101 S.Ct. 802, 807 (1981). Thus, the issue properly before the Court on this appeal is not the wisdom of the Illinois legislature in enacting Section 8(b) of the Fair Employment Practices Act, nor the correctness of the Illinois Supreme Court's decision construing that statute; the questions is whether that statute, as construed, violated Laverne Logan's rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution.

An analysis of the Illinois Supreme Court's decision is pertinent, however, to an analysis of whether a property or liberty interest arose under Illinois law in connection with Logan's charge of employment discrimination because, in order to invoke the federal due process and equal protection clauses, Logan must show that he was deprived of property or liberty under color of state law. And, as this Court has explained, property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure benefits and that support claims of entitlement to those

benefits." *Parratt v. Taylor,* ..... U.S. ....., ..., 101 S.Ct. 1908, 1910 n.1 (1981); *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701 (1972). Logan does not contend that his right to be free from discrimination in employment on the basis of his physical handicap arises from any source other than state law (Brief for Appellant at 26).

In *Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553 (1980), the survivors of a young girl murdered by a parolee sued state parole officials, alleging that their negligent decision to release the parolee despite his known dangerous propensities resulted in the girl's death. A state statute conferred on the officials complete immunity from state-law claims for injuries resulting from their parole determinations. The plaintiffs contended that by barring their state-law cause of action against the parole officials, the state immunity statute violated the Fourteenth Amendment to the United States Constitution. In upholding the California statute, this Court noted:

> "Arguably, the cause of action for wrongful death that the State has created is a species of 'property' protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials."

444 U.S. at 281-82, 100 S.Ct. at 557. Both Logan and the Commission rely on the first sentence quoted above to support their position that Logan's right to a cause of action against the Company was "property" under Illinois law. Such reliance is misplaced when the quoted language is read in conjunction with the Court's footnote to the same passage:

> "It is arguable, however, that the immunity defense, like an element of the tort claim itself, is merely one aspect of the State's definition of that property interest. Recently, in considering a lawyer's claim of immunity in a state malpractice action, we noted that 'when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law.' "

444 U.S. at 282 n. 5; 100 S.Ct. at 557 n. 5 (citations omitted). The decision of the Illinois Supreme Court in this case strongly supports the conclusion that the 120-day conference requirement of Section 8(b) is merely one aspect of the State's definition of the property interest created by its Fair Employment Practices Act.

The Illinois Fair Employment Practices Act ("FEPA") first became law in 1961. As originally enacted, Section 3 of the FEPA prohibited employment discrimination on the basis of race, color, religion, national origin or ancestry. Ill. Rev. Stat. ch. 48, §853 (1961). In 1975, Section 3 was amended to include "physical or mental handicap unrelated to ability" as a protected basis. Ill. Rev. Stat. ch. 48, §853 (1975).

Illinois thus chose to join the thirty-seven other states,[1] and the District of Columbia, which have enacted statutes prohibiting discrimination against handicapped persons

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[1] Alaska, California, Colorado, Connecticutt, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

in the private work force. The various laws in these states differ greatly in both substance and procedure.[2]

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[2] *See* Alaska Stat. §§18.80.010—18.80.300 (1974 & Supp. 1980); Cal. Gov't Code §§12900—12996 (West 1980); Colo. Rev. Stat. §24-34-301 *et seq.* (1980 Cum. Supp.); Conn. Gen. Stat. Ann. §§46a-51—46a-99 (West Supp. 1981); Fla. Stat. Ann. §§23.161—23.167 (West Supp. 1981); Ga. Code Ann. §§66-501—66-506 (Supp. 1981); Haw. Rev. Stat. §§378-1—378-38 (1976 & Supp. 1980); Ind. Code Ann. §22-9-1-1 *et seq.* (Burns 1974 & Supp. 1980); Iowa Code Ann. §§601A.1—601A.17 (West 1975 & Supp. 1981-82); Kan. Stat. Ann. §44-1001 *et seq.* (1973 & Supp. 1979); Ky. Rev. Stat. §§207.130—207.240 (1977 & Supp. 1980); La. Rev. Stat. Ann. §§46.2251—46.2256 (West Supp. 1981); Me. Rev. Stat. Ann. tit. 5, §4551 *et seq.* (West 1979 & Supp. 1980-81); Md. Ann. Code art. 49A, §§1-28 (1979); Mass. Gen. Laws Ann. ch. 149, §24K (West Supp. 1981); Mich. Comp. Laws Ann. §37.1101 *et seq.* (West Supp. 1981); Minn. Stat. Ann. §§363.01—363.14 (West 1966 & Supp. 1981); Mo. Ann. Stat. §§296.010—296.070 (Vernon Supp. 1981); Mont. Rev. Code Ann. §§64-301—64-330 (Cum. Supp. 4 pt.1 1977); Neb. Rev. Stat. §§48-1101—48-1125 (1978 & Supp. 1980); Nev. Rev. Stat. §§613.310—613.430 (1979); N. H. Rev. Stat. Ann. §§354-A:1—354-A:14 (1966 & Supp. 1979); N.J. Stat. Ann.§§10:5-1—10:5-38 (West 1976 & Supp. 1981); N. M. Stat. Ann. §§28-1-1—28-1-14 (1978 & Supp. 1981); N.Y. Exec. Law §§290-291 (McKinney 1972 & Supp. 1980); Ohio Rev. Code Ann. §§4112.01—4112.99 (Page 1980); Or. Rev. Stat. §§659.400—659.435 (1979); Pa. Stat. Ann. tit. 43, §§951—963 (Purdon 1964 & Supp. 1980); R.I. Gen. Laws §§28-5-1—28-5-39 (1979 & Supp. 1980); Tenn. Code Ann. §§8-50-103, 8-50-104 (1980); Tex. Human Resources Code Ann. tit. 8, §§121.001—121.009 (Vernon 1980); Utah Code Ann. §§34-35-1—34-35-8 (1974 & Supp. 1979); Vt. Stat. Ann. tit. 21, §498 (1979); Va. Code §40.1-28.7 (1981); Wash. Rev. Code Ann. §§49.60.010—49.60.320 (1962 & Supp. 1981); W. Va. Code §§5-11-1—5-11-19 (1979 & Supp. 1981); Wis. Stat. Ann. §§111.31—111.37 (West 1974 & Supp. 1981).

Three additional states prohibit such discrimination only in public employment;[3] eight others do not prohibit employment discrimination against the handicapped at all.[4]

In interpreting the 120-day conference requirement contained in Section 8(b) of the FEPA as mandatory, the Supreme Court of Illinois examined the statutory language "within the context of the entire statute, looking particularly to the purpose of the legislation." *Zimmerman Brush Company v. Fair Employment Practices Commission,* 82 Ill.2d 99, 103, 411 N.E.2d 277, 280 (1980) (J.A. 30-31). The Illinois Supreme Court viewed the case against the background of earlier decisions in which the court had unequivocally held that a similar time requirement, contained in another section of the FEPA, was intended by the legislature to be mandatory. In *Springfield-Sangamon County Regional Plan Commission v. Illinois Fair Employment Practices Commission,* 71 Ill.2d 61, 373 N.E.2d 1307 (1978), the court had been called on to construe Section 8(c) of the FEPA, which at the time of the filing of the charge in that case provided:

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[3] Alabama (*See* Ala. Code tit. 21, §21-7-8 (1975)); Arkansas (*See* Ark. Stat. Ann. §§82-2901—82-2907 (Supp. 1981)); and Mississippi (*See* Miss. Code Ann. §43-6-15 (Supp. 1979)).

[4] Arizona (*See* Ariz. Rev. Stat. Ann. §41-1463 (West Supp. 1980-81)), Delaware (*See* Del. Code tit. 19, §711 (1974)). Idaho, North Dakota, Oklahoma, South Carolina, South Dakota (*See* S.D. Codified Laws §20-13-10 (1979)), and Wyoming. North Carolina's Equal Employment Practices Act does not prohibit discrimination, but declares it to be against "public policy." N.C. Gen. Stat. §§143.422-1—143.422-3 (1978); *accord, Spagnuolo v. Whirlpool,* 467 F.Supp. 364 (W.D.N.C. 1979).

> "Whenever a charge of an unfair employment practice has been properly filed, the Commission, within 180 days thereof, shall either issue and serve a complaint in the manner and form set forth in this Section or shall order that no complaint be issued. Any such order shall be duly served upon the complainant and the respondent."

Ill. Rev. Stat. ch. 48, §858(c) (1967) (current version at Ill. Rev. Stat. ch. 68, §7-102(G) (Supp. 1980)). The court in *Springfield-Sangamon* ruled that the 180-day period requirement "was intended to ensure expeditious action on behalf of the [Commission], and must be considered mandatory." 71 Ill.2d at 68, 373 N.E.2d at 1310. In reaching this conclusion, the court noted that delays by the Commission "would tend to hamper the remedial and reconciliatory procedures which underlie the very purpose of the Fair Employment Practices Act," 71 Ill.2d at 68, 373 N.E.2d at 1310, and analogized the 180-day requirement to a statute of limitations. *Id.*

In 1979, the Illinois Supreme Court issued a writ of prohibition against the Commission in the case of *Board of Governors v. Illinois Fair Employment Practices Commission*, 78 Ill.2d 143, 399 N.E.2d 590 (1979). Relying on *Springfield-Sangamon*, the court held that the Commission could not proceed on a complaint which it had filed after the expiration of the 180-day period.

Thus, for nearly two years before Logan filed his charge in this case, the clear state of the law in Illinois was that inaction by the Commission could result in the forfeiture of a complainant's rights to have his charge investigated and evaluated. In *Springfield-Sangamon*, the court addressed this very issue:

> "Although an aggrieved individual who has suffered discrimination should not be deprived of the

> benefits of the Act because of administrative failures, we must also consider that those charged under the Act have the right to a determination of the validity of the charge within the time limitations of the statute. In the event of a finding against a respondent the impact of the administrative order may be severe. In this case, the order was entered March 29, 1973, almost 5 years after the alleged unfair employment practice. This period of time would have been substantially shortened and the amount of money the respondents would have been required to pay [the complainant] as accrued salary and interest would have been considerably less if [the complainant] and the [Commission] had complied with the statute. The respondents have the right to expect that the impact of such administrative orders will be minimized by compliance with the statutory time limitations."

71 Ill.2d at 73, 373 N.E.2d at 1312.

In Logan's case before the Illinois Supreme Court, the Commission argued that the *Springfield-Sangamon* rationale should not be applied to Logan's case, where the charge was filed five days after termination of employment and the conference convened five days after the 120-day limitation period had run. (J.A. 32). Whatever the merits of this position may be as a matter of raw justice or social policy, the Illinois Supreme Court firmly rejected it as a matter of state law:

> "We deem that this contention that the conference should be allowed to proceed beyond the 120-day period interprets *Springfield-Sangamon* too narrowly and ignores the goals underlying section 8(b)."

82 Ill.2d at 105, 411 N.E.2d at 281. (J.A. 32).

Noting that Section 8(b) had been enacted after the *Springfield-Sangamon* decision had construed the word "shall" in Section 8(c), the court held:

> "We consider that the legislature's use again of the term 'shall' in section 8(b) indicates an intention that the prescription of a 120-day period be given a manadtory construction. . . . It is reasonable to consider that under these circumstances the legislature intended to accept the prior construction of 'shall.'"

82 Ill.2d at 104-05; 411 N.E.2d at 280-81. (J.A. 21-32). This interpretation of state law by the highest court of the state is binding on this Court. *Hortonville Joint School District v. Hortonville Education Association,* 436 U.S. 482. 96 S.Ct. 2308 (1976); *Henry v. Mississippi,* 379 U.S. 443, 85 S.Ct. 564 (1965). The Illinois Supreme Court's opinion holds that the Commission's failure to act on a complainant's charge within statutory time limitations results in the automatic dismissal of that charge. Thus, the 120-day conference requirement of Section 8(b) is, in effect, a condition precedent to an individual complainant's rights under the FEPA.

Logan's argument that once filed, his charge could only be dismissed "for cause," ignores the holding of the Illinois Supreme Court that a charge must be automatically dismissed if the Commission fails to comply with statutory time limitations. 82 Ill.2d at 106, 411 N.E.2d at 282. If a charge can be *automatically* dismissed, then obviously it can be dismissed for reasons other than "for cause."

Logan therefore had no property interest in his FEPA charge unless and until a timely conference was held. If it is true, as Logan contends, that "the presentation of an FEPA case is controlled entirely by the complainant," (Brief for Appellant at 28 n.6) then it would be the complainant's responsibility to make sure that the Commission scheduled the fact-finding conference within 120

days, which Logan did not do.[5] If that is not the case, then the only logical alternative is that Illinois has chosen, for various policy reasons underlying the statute, to place the potential rights of employment discrimination complainants in the hands of the Commission, which is the state agency charged with the prompt administration of the FEPA.

Because no timely hearing was held, Logan's interest never rose to the level of a statutory entitlement such as those involved in the cases he cites. In *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970), recipients' welfare benefits could not be terminated by the state without "cause"; in *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729 (1973), state law required "grounds" before a student could be suspended from school; in *Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642 (1979), state law required a finding of "at least negligence" before a horse trainer's license could be revoked; in *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633 (1974), a public employee could only be terminated "for cause" under state law. As noted above, Logan's citation of these authorities begs the issue, because Illinois law not only allows but *requires* "automatic dismissal" of FEPA charges for a reason

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[5] Although the soundness or fairness of Illinois law is not an issue properly before this Court, it is interesting to note this Court's recent decision in a somewhat analogous Title VII context. In *Mohasco v. Silver,* 447 U.S. 807, 100 S.Ct. 2486 (1980), a claimant's EEOC charge was held to be time-barred for failure to file within the statutory time limitation for deferral states, despite the existence of prior EEOC regulations and lower court case law which had interpreted the limitation in a manner which supported the claim of timeliness. This Court held that it was not unfair to require pro se complainants to observe the statutory requirements which it was then construing for the first time.

other than "for cause:" the failure of the Commission to meet statutory time limitations enacted to effectuate the FEPA's purposes.

Logan correctly asserts that his right to procedural due process arises, not from state law, but from the federal Constitution. He then argues that Illinois should not be allowed to "simultaneously create protected interests and limit those interests by procedures that violate due process." Brief for Appellant at 32. This reasoning is faulty in two respects.

First, Logan was not deprived of "property". Procedural due process applies only where there is a deprivation of "liberty" or "property" within the meaning of the Fourteenth Amendment. In *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155 (1978), the Court reviewed various types of interests which have been found to constitute "liberty" or "property". The Court then noted:

> "In each of these cases, as a result of the state action complained of, *a right or status previously recognized by state law* was distinctly altered or extinguished. It was this alteration, officially removing the interest from the *recognition and protection previously afforded by the State,* which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment."

424 U.S. at 711; 96 S.Ct. at 1165 (emphasis added). Since the Illinois Supreme Court ruled that Logan's FEPA charge was dependent on the timely convening of a fact-finding conference, the statute which gave Logan the right to file a charge did not, in and of itself, afford Logan any protection from the negligent failure of the Commission to convene the conference. When the state does not vouchsafe an individual's right

or interest, no "liberty" or "property" interest has been created within the meaning of the Fourteenth Amendment. *Cf. Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155 (1978) (no legal guarantee under state law of present enjoyment of reputation). Logan cannot claim a right to have the Commission proceed on his charge despite the late scheduling of the conference because the decision of the Illinois Supreme Court is directly to the contrary.

Second, the facts of this case preclude a need to constitutionally analyze "the adequacy of *statutory procedures for deprivation* of a statutorily created property interest," *Arnett v. Kennedy,* 416 U.S. 134, 167, 94 S.Ct. 1633, 1650-51 (1974) (Powell, J., concurring) (emphasis added.) Logan was not deprived of any property interest *pursuant* to statutory procedures; it was the Commission's negligent failure to follow the mandated statutory procedures which resulted in Logan's charge being dismissed.[6] It would be a singularly inappropriate exercise of the appellate jurisdiction of this Court to hold a state statute unconstitutional because, in one isolated instance, a state employee negligently failed to follow that statute. *Cf. Parratt v. Taylor,* ..... U.S. ....., ..., 101 S.Ct. 1908, 1918 (Powell, J., concurring) (negligent acts by state officials do not constitute deprivations of property within the meaning of the Fourteenth Amendment). Here, as in *Paul v. Davis,* the argument advanced by the

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[6]All of the parties to this appeal agree that the Commission's failure to schedule a fact-finding conference within 120 days was negligent. *See* Brief for Appellant at 4; Brief for Appellees Illinois Human Rights Commission, *et al.* at 6 (scheduling was "erroneous"); Brief for Congress of Organizations of the Physically Handicapped *et al.* as *Amicus Curiae* at 6.

party invoking the due process clause "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." 424 U.S. at 699; 96 S.Ct. at 1159.

Equal protection analysis is likewise inapplicable to this case, both because no property or liberty interest existed and because the 120-day requirement of Section 8(b) applied equally to all FEPA claimants. As his only means of invoking the equal protection clause, Logan argues, in effect, that Section 8(b) creates two classes of complainants: those for whom the Commission convenes a conference within 120 days of the filing of a charge and those for whom the Commission fails to do so. Brief for Appellant at 41-42. This strained construction of the statute finds no support in the Illinois Supreme Court's opinion below. No such distinctions are created by the FEPA itself or by its lawful application. The statute cannot be said to create a class of claimants whose conferences are not timely convened, because its express mandate is that such conferences *be* convened. Logan does not represent any class defined by or arising out of the application of state law; to the contrary, he is an individual victim of a state agency's failure to follow controlling state law.

Unlike the double-bond requirement in forcible entry and detainer appeals which was the subject of this Court's analysis in *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862 (1972), the 120-day conference requirement of Section 8(b) does not label any charge unfounded. The Court found in *Lindsey v. Normet* that the double-bond requirement drew a distinction based on whether potential appellants could afford to post the bond. Section

8(b) draws no distinctions between claimants who have filed FEPA charges. Notwithstanding Logan's contention that the 120-day requirement is "unlike a statute of limitations" (Brief for Appellant at 47 n.14), the Illinois Supreme Court's opinion strongly suggests that that is exactly what it is like. *See* 82 Ill.2d at 103-04, 411 N.E.2d at 280 (J.A. 31) (citing the *Springfield-Sangamon* case.)

This Court has recently reaffirmed that "where a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from 'the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy.'" *City of Mobile v. Bolden,* 446 U.S. 55, 76, 100 S.Ct. 1490, 1505, (1980), citing *San Antonio Ind. School Dist. v. Rodriguez,* 411 U.S. 1, 33, 93 S.Ct. 1278, 1296 (1973). Logan's right to seek redress for alleged employment discrimination on the basis of physical handicap exists only by virtue of Illinois law. Illinois has, in its exercise of its power to shape that right, conditioned it on the convening of a timely conference by the state agency charged with administering the applicable statute. Illinois was not required to grant Logan an unconditional right to a cause of action against the Company. Logan would prefer that the FEPA had guaranteed him the right to pursue his claim even if the Commission failed to convene a timely conference. The statute did not do so, however, and for that very reason there was no deprivation of a property or liberty interest within the meaning of the Fourteenth Amendment.

II. Assuming Arguendo That Logan Was Deprived of Property, the Company Was Not Responsible for That Deprivation, and Should Not Be Forced to Sacrifice its Substantive Rights Under State Law to Redress the Commission's Negligence.

In the *Martinez* decision, this Court said that a state-created cause of action was "arguably" a species of property for the purpose of analyzing the constitutionality of a state statute that provided certain state officials with immunity from a wrongful death action. Yet the Court went on to hold that the immunity statute did not violate the Fourteenth Amendment, reasoning that "even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California,* 444 U.S. 277, 282, 100 S.Ct. 553, 557 (1980). The Court reviewed the State of California's purposes for enacting the immunity statute, as set forth in the decision of the California court, and concluded:

> "Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to defeat a tort claim arising under state law."

444 U.S. at 283, 100 S.Ct. at 558.

In its decision in this case, the Illinois Supreme Court articulated the legislative policies which underlie the 120-day requirement:

> "Under section 8(b) the interests of both employee and employer can be served in that each is given an opportunity to discuss and possibly settle the dispute without formal action being taken against the employer by the Commission. Through a conference, unnecessary costs may be avoided and the Commission permitted to devote itself to other matters. Even if a settlement is not reached at this state, the proceeding can be importantly valuable to the Commission in that the conference not only places the Commission in a better posture to decide whether to dismiss the employee's charge, it also aids the Commission in setting up a procedural framework for the conciliatory process which follows. (See Ill. Rev. Stat. 1979, ch. 49, par. 858(c).) The public interest in an expenditous resolution of disputes which is made possible through section 8(b) is not less important than the financial considerations discussed in *Springfield-Sangamon*. Avoiding unnecessary expenditures of time and money by all parties serves to further the stated policy of the Act, which is not only to protect employees from unfair employment practices but also to protect 'employers, labor organizations and employment agencies from unfounded charges of discrimination.' Ill. Rev. Stat. 1979, ch. 48, par. 851."

82 Ill.2d at 105-06, 411 N.E.2d at 281. (J.A. 33).

Neither these articulated state policies nor the way that the 120-day requirement furthers these policies can reasonably be termed "wholly arbitrary or irrational." Logan's real contention is not that Section 8(b) is arbitrary or irrational; it is that the Commission's negligent failure to convene a timely conference resulted in Logan's arbitrarily and irrationally losing his right to pursue his

charge. Yet Logan has chosen not to sue the Commission or any of its employees for their negligence,[7] but instead asks "only that his cause of action be reinstated" before the Commission. Brief for Appellant at 33 n.7. Logan ignores the fact that under state law, as articulated by the Illinois Supreme Court, the Company also has rights. Nothing in the Fourteenth Amendment compels or even permits this Court to reinstate Logan's claim against the Company as a means of compensating Logan for the Commission's negligence. Rather, remedying any deprivation is a matter to be resolved between Logan and the State of Illinois.

This Court has recently held that post-deprivation remedies made available by the state can satisfy the requirements of the due process clause. In *Parratt v. Taylor,* ..... U.S. ....., 101 S.Ct. 1908 (1981), state employees in a Nebraska prison negligently misplaced mail order hobby materials belonging to Taylor, a prisoner. Taylor brought an action under 42 U.S.C. §1983 to recover the value of the lost materials, alleging that he had been deprived of property without due process of law in violation of the Fourteenth Amendment.

Although a federal cause of action was involved in *Parratt v. Taylor,* the constitutional issue in that case was identical to the issue here: whether there was a deprivation of property without due process of law. *See Parratt v. Taylor,* ..... U.S. ....., ..., 101 S.Ct. 1908, 1913 (1981).

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[7] Presumably, in an action against the Commission or its employees Logan would have to prove, as in legal malpractice cases, that he had a meritorious claim against the Company which was lost due to the negligence of the investigator.

Taylor alleged that the negligent acts of the prison employees deprived him of his hobby materials; Logan maintains that the Commission's negligence deprived him of a cause of action.

Writing for a four-member plurality, Justice Rehnquist first noted that Taylor's claim satisfied three prerequisites of a valid due process claim. The prison employees had acted under color of state law; the hobby materials fell within the definition of property[8]; and "the alleged loss, even though negligently caused, amounted to a deprivation." ..... U.S. at ....., 101 S.Ct. at 1913. The Court went on to decide, however, that no violation of the due process clause had been stated because the deprivation was not "without due process of law:"

> "Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing. Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation. The State provides a remedy to persons who believe they have suffered a tortious loss at the hands of the State . . . . The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process."

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[8] There was no contention that under Nebraska law Taylor did not enjoy a property interest in the hobby materials. ..... U.S. at ....., 101 S.Ct. at 1910 n.1.

..... U.S. at ....., 101 S.Ct. at 1917. The similarities between the *Parratt v. Taylor* case and Logan's case are striking. Logan's charge was dismissed because of the unauthorized failure of the Commission to follow established state procedure which required the convening of a timely fact-finding conference. Logan does not contend that the Commission's conciliation procedures are inadequate; indeed, he seeks reinstatement of his claim so that he may enjoy "the same opportunity to present his case and have state judicial review that is afforded all other complainants whose claims were not negligently extinguished." Brief for Appellant at 33 n.7. A predeprivation hearing would have been no more practicable here than in *Parratt v. Taylor* because the negligent failure of the Commission to schedule a conference was as much a "random and unauthorized act by a state employee" (..... U.S. at ....., 101 S.Ct. at 1915) as was the loss of Taylor's hobby materials.

Finally, a remedy similar to the remedy available to Taylor under Nebraska law is available to Logan under Illinois law. The Illinois Court of Claims Act grants jurisdiction over "all claims against the State for damages in cases sounding in tort." Ill. Rev. Stat. ch. 37, §439.8(d) (1979).[9] Logan maintains that this remedy is "uncertain" but cites no authority indicating that no ac-

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[9] The 1970 Illinois Constitution abolished sovereign immunity "[e]xcept as the General Assembly may provide by law." Ill. Const. Art. 13, §4. As established by statute, Illinois's waiver of sovereign immunity is coextensive with the jurisdiction of the Illinois Court of Claims. Ill. Rev. Stat. ch. 127, §801 (1979); *Liebman v. Board of Governors*, 79 Ill. App.3d 89, 398 N.E.2d 305 (1st Dist. 1979).

tion would lie for a loss such as his.[10] If that were the case, and Illinois offered no alternative remedy,[11] then the clear import of this Court's holding in *Parratt v. Taylor* is that Logan would have a valid §1983 action against the state employees who negligently deprived him of his interest in his FEPA charge. *See* ..... U.S. at ....., 101 S.Ct. at 1912 ("Nothing in the language of §1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights"); ..... U.S. at .....,

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[10] Logan also argues that the relief available in a Court of Claims action would not compensate him as fully for alleged employment discrimination as would his potential recovery in an FEPA action. Brief for Appellant at 24 n.5. The Court in *Parratt v. Taylor* rejected a similar argument made by Taylor with respect to the Nebraska tort claims procedure. *See* ..... U.S. at ....., 101 S.Ct. at 1917. Moreover, Logan presumes that he would have prevailed in his FEPA action against the Company, a fact which remains unproven.

[11] *See* Brief for Appellant at 24-25 n.5. The Illinois Equal Opportunity for the Handicapped Act, Ill. Rev. Stat. ch. 38, §65-21 *et seq.* (1979), was repealed when the Illinois Human Rights Act went into effect on July 1, 1980. Causes of action arising under the EOHA prior to July 1, 1980, are not affected by the repeal. Ill. Rev. Stat. ch. 68, §9-102(2) (Supp. 1980).

Logan also appears to have a cause of action against the individual commission employee or employees who negligently failed to schedule the conference within the time limitation. *See Lusietto v. Kingan*, 107 Ill. App.2d 239, 243, 246 N.E.2d 24, 26-27 (3d Dist. 1969) ("The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its non-performance.") Public officials enjoy immunity only when they are exercising their official discretion on matters which are discretionary in nature and not ministerial. *Id.*

101 S.Ct. at 1918 (Blackmun, J., and White, J., concurring); ..... U.S. at ....., 101 S.Ct. at 1923 (Marshall, J., concurring); *but see* ..... U.S. at ....., 101 S.Ct. at 1918 (Powell, J., concurring in the result) (negligent acts by state officials do not constitute a deprivation of property within the meaning of the Fourteenth Amendment.)

CONCLUSION

For the foregoing reasons, appellee Zimmerman Brush Company requests that the judgment of the Illinois Supreme Court be affirmed, or in the alternative, that the appeal be dismissed.

Respectfully submitted,

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APPENDIX

Section 8 of the Illinois Court of Claims Act (Ill. Rev. Stat. ch. 37, §439.8 (1979)) provides in pertinent part:

> § 8. The court shall have exclusive jurisdiction to hear and determine the following matters:
>
> . . .
>
> (d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities; provided, that an award for damages in a case sounding in tort, other than certain cases involving the operation of a State vehicle described in this paragraph, shall not exceed the sum of $100,000 to or for the benefit of any claimant. The $100,000 limit prescribed by this Section does not apply to an award of damages in any case sounding in tort arising out of the operation by a State employee of a vehicle owned, leased or controlled by the State. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-5950

LAVERNE L. LOGAN,
Appellant,
vs.
ZIMMERMAN BRUSH COMPANY,
Appellee.

On Appeal From The Supreme Court Of Illinois

SUPPLEMENTAL BRIEF FOR APPELLEE ZIMMERMAN BRUSH COMPANY

STATUTES AND PROVISIONS INVOLVED

The following are in addition to the Constitutional and Statutory Provisions cited in the Brief for Appellant.

Article 13, Section 4 of the 1970 Illinois Constitution provides: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

Chapter 127, Section 801 of the Illinois Revised Statutes (1979) provides:

> "Except as provided in "AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal an AN ACT herein named,' filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any court."

The applicable section of the Illinois Court of Claims Act is set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

On November 14, 1979, appellant Laverne L. Logan ("Logan") filed an employment discrimination charge with the Illinois Fair Employment Practices Commission ("Commission"). Logan charged that his employer, appellee Zimmerman Brush Company ("Company"), had discriminated against him because of his physical handicap, a short left leg. On January 30, 1980, the Company received notice from the Commission that a fact-finding conference would be held on March 18, 1980. The Company also received a questionnaire, which it was directed to answer by March 10, 1980. The Company filed its answers to the questionnaire with the Commission on March 7, 1980. In its answers, the Company stated that it had made efforts to accommodate Logan's handicap, but that he was unable to handle the physical requirements of either the job he was initially hired to do or the alternative job the Company had given him[1] and that accordingly he was terminated. (J.A. 10-11).

On March 18, 1980, the Company appeared at the fact-finding conference for the sole purpose of filing a motion to dismiss. The Company asserted that Logan was not entitled to have the Commission pursue his charge because the Commission had failed to convene a fact-finding conference within 120 days of the filing of the charge, as required by Section 8(b) of the Illinois Fair

[1] The Illinois Fair Employment Practices Act (FEPA) prohibited discrimination against "physical or mental handicap *unrelated to ability*." Ill. Rev. Stat. ch. 48, §853(a) (1979) (emphasis added) (current version at Ill. Rev. Stat. ch. 68, §1-103(I)(1) (Supp. 1980)).

Employment Practices Act ("FEPA").[2] (J.A. 14). The Commission denied the Company's motion and on March 19, 1980, notified the Company that the investigation of Logan's charge would continue. The Commission also requested interviews with certain of the Company's employees and informed the Company that failure to comply with this request could result in a finding that there was "substantial evidence" to support Logan's charge. (J.A. 16).

On March 20, 1980, the Company petitioned the Supreme Court of Illinois for a writ of prohibition. Proceedings before the Commission were stayed pending the decision on the petition. (J.A. 24-25). Prior to oral argument on the petition, on April 30, 1980, Logan filed a second charge, identical to his first, with the Commission. (J.A. 26-27). The Commission notified the Company of its intent to proceed on the second charge and the Company moved to stay proceedings on the second charge, which motion was granted. (J.A. 30).

On September 29, 1980, the Supreme Court of Illinois awarded the Company a writ of prohibition against the

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[2] The section in effect at the time provided:

> "Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purpose of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and a default order may be entered against any party who fails to attend such conference without good cause shown."

Ill. Rev. Stat. ch. 48, §858(b) (1979) (current version at Ill. Rev. Stat. ch. 68, §7-102(C)(3) (Supp. 1980)).

Commission. *Zimmerman Brush Company v. Illinois Fair Employment Practices Commission*, 82 Ill.2d 99, 411 N.E. 2d 277 (1980). The court construed the language of Section 8(b), directing that the Commission convene a fact-finding conference within 120 days of the filing of a charge, as mandatory, and held that the Commission's failure to convene a timely conference in Logan's case required the automatic dismissal of his charge. The court rejected the Commission's contention that the 120-day requirement should be viewed as discretionary.

Prior to the Illinois Supreme Court's decision, the Illinois legislature repealed the FEPA and reenacted it, as amended, as part of the Illinois Human Rights Act.[3] In the Illinois Supreme Court, Logan argued that his second charge should be governed by the amended Act, which he contended made fact-finding conferences discretionary.[4] The court did not rule on this contention but refused to apply the new Act retroactively to Logan's second charge.

The court also rejected Logan's argument that Section 8(b) as construed violated his Fourteenth Amendment due process and equal protection rights, holding that:

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[3] Illinois Human Rights Act, P.A. 81-1216, 1979 Ill. Legis. Serv. 3380 (West) (effective July 1, 1980) (codified at Ill. Rev. Stat. ch. 68, §§1-101 *et seq.* (Supp. 1980)).

[4] Section 7-102(C)(3) of the Illinois Human Rights Act provides:

> "Upon reasonable notice to the complainant and the respondent, the Department may conduct a fact-finding conference. The fact-finding conference shall be held within 120 days of the date on which a charge has been filed unless waived by the parties in writing 10 days before the 120 day period has expired."

Ill. Rev. Stat. ch. 68, §7-102(C)(3) (Supp. 1980).